# HLE Engineering Sdn Bhd v HTE Letrik Bumi JV Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(IM)-1072–05 OF 2013
AZAHAR MOHAMED, MOHTARUDIN BAKI, ABANG ISKANDAR JJCA
15 JANUARY 2015

*Companies and Corporations — Winding up — Suit by company — Whether wound up company incapable of continuing with pending suit without prior sanction of official receiver — Whether company's action without sanction became abuse of process of court and was liable to be struck out — Whether stay of winding up order did not have effect of wiping out the order*

About two years after the appellant filed a contractual claim against the respondent in the High Court, it was wound up pursuant to a court order. As the appellant failed to obtain the official receiver's sanction to continue prosecuting the suit, the respondent applied (by encl 62) to strike out the suit under O 18 r 19(b) and (d) of the Rules of Court 2012 on the ground it was an abuse of process to allow it to remain as the appellant became incapable of maintaining the suit without the sanction. In the instant appeal against the High Court's allowing of encl 62, the appellant contended that res judicata barred the respondent from raising the issue of the appellant's locus standi to maintain the suit because that issue was allegedly raised and decided against the respondent by the High Court in previous interlocutory applications. The appellant also argued that since it had obtained a stay of the winding up proceedings, the stay order had the effect of wiping out the winding up order thus making it competent for the appellant to continue maintaining the civil suit without prior sanction of the official receiver.

**Held**, dismissing the appeal and affirming the decision of the High Court with costs of RM5,000:

(1) As the appellant failed to obtain prior sanction of the official receiver to continue with or maintain its action against the respondent after it was wound up, its action no longer had any proverbial legs to stand on. The appellant became incapacitated in so far as its capacity to sue or to defend a legal suit was concerned. This extended to its capacity to maintain or continue with a pending suit. The action could not in law be sustained and it became an abuse of process of court. The High Court was right in allowing encl 62 to strike out the action (see paras 18–19).

(2) No stay order could have a retrospective effect in the sense that it could wipe out a winding up order. The issue of sanction was also not caught by

the res judicata principle. The interlocutory applications that were previously before the High Court were not concerned with the issue of sanction to continue with the proceedings which was the live issue before the High Court in encl 62 (see paras 11, 14 & 19).

**[Bahasa Malaysia summary**

Lebih kurang dua tahun selepas perayu memfailkan tuntutan kontraktual terhadap responden di Mahkamah Tinggi, ia digulung berikutan perintah mahkamah. Memandangkan perayu gagal untuk memperolehi sanksi pegawai penerima untuk meneruskan mendakwa guaman tersebut, responden memohon (melalui lampiran 62) untuk membatalkan tindakan di bawah A 18 k19(b) dan (d) Kaedah-Kaedah Mahkamah 2012 atas alasan ia adalah penyalahgunaan proses untuk membenarkannya kekal kerana perayu menjadi tidak berupaya mengekalkan guaman tanpa sanksi. Dalam rayuan ini terhadap pembenaran Mahkamah Tinggi terhadap lampiran 62, perayu berhujah bahawa res judicata menghalang responden daripada membangkitkan isu locus standi perayu untuk mengekalkan tindakan kerana isu tersebut didakwa dibangkitkan dan diputuskan terhadap responden oleh Mahkamah Tinggi dalam permohonan interlokutori terdahulu. Perayu juga berhujah bahawa memandangkan ia memperolehi penangguhan prosiding penggulungan, perintah penangguhan mempunyai kesan menghapuskan perintah penggulungan dengan itu membuatkannya kompeten bagi perayu untuk meneruskan dengan mengekalkan guaman sivil tanpa sanksi daripada pegawai penerima.

**Diputuskan**, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi dengan kos sebanyak RM5,000:

(1) Memandangkan perayu gagal untuk memperolehi sanksi terdahulu daripada pegawai penerima untuk meneruskan dengan atau mengekalkan tindakannya terhadap responden selepas ia digulung, tindakannya tidak lagi mempunyai apa-apa asas untuk bergantung. Perayu menjadi tidak berupaya setakat berkenaan kapasitinya untuk menyaman atau untuk membela guaman undang-undang. Ini berlanjutan kepada kapasitinya untuk mengekalkan atau meneruskan dengan guaman belum didengar. Tindakan ini tidak dapat dari segi undang-undang dapat dikekalkan dan ia menjadi penyalahgunaan proses mahkamah. Mahkamah Tinggi adalah betul dalam membenarkan lampiran 62 untuk membatalkan tindakan tersebut (lihat perenggan 18–19).

(2) Tiada perintah penangguhan boleh mempunyai kesan retrospektif yang mana ia dapat menghapuskan perintah penggulungan tersebut. Isu sanksi juga tidak termasuk oleh prinsip res judicata. Permohonan-permohonan interlokutori yang terdahulu sebelum Mahkamah Tinggi tidak berkaitan dengan isu sanksi untuk meneruskan

dengan prosiding yang mana adalah isu semasa di hadapan Mahkamah Tinggi dalam lampiran 62 (lihat perenggan 11, 14 & 19).]

**Notes**

For cases on suit by company, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1893–1894.

**Cases referred to**

*American International Assurance Bhd v Coordinated Services L Design Sdn Bhd* [2012] 1 MLJ 369, CA (refd)

*Farlim Properties Sdn Bhd v Goh Keat Poh & Ors And Other Appeals* [2003] 4 MLJ 654; [2003] 4 CLJ 505, CA (folld)

*Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406, CA (refd)

*Zaitun Marketing Sdn Bhd v Boustead Aldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)

**Legislation referred to**

Companies Act 1965 s 233(2)
Rules of Court 2012 O 18 r 19(1)(b), (d)

**Appeal from:** Civil Suit No 22–61 of 2007 (High Court, Ipoh)

*Cheong Sek Kwan (Chan Kok Keong with him) (Chan & Assoc) for the plaintiff. Lalchand Nathermal (Lalchand & Nawawi) for the defendant.*

**Abang Iskandar JCA (delivering judgment of the court):**

BRIEF FACTS OF THE CASE

**[1]** By virtue of letters dated 6 September 2000, and 14 November 2000, the plaintiff had been appointed as a subcontractor to supply electrical equipment and for electrical works valued at RM16,700,000 for the defendant's project known as Tanjung Malim Polytechnic Complex ('the contract work').

**[2]** The plaintiff's claim as per the statement of claim dated and filed on 2 March 2007 is for a sum of RM3,580,842.49, being the amount due and payable by the defendant, for the work done by the plaintiff based on a variation order in relation to the contract work.

**[3]** It is an undisputed fact that the plaintiff was wound up pursuant to a court order on 6 July 2009 and no sanction has been obtained by the plaintiff to continue with the civil suit from the Insolvency Department as required under s 236 of the Companies Act.

**[4]** The defendant, vide a notice of motion marked as encl 62, had applied to the High Court of Ipoh to strike out the plaintiff's writ of summon and statement of claim dated 2 March 2007 pursuant to O 18 r 19(1)(b) and (d) of the Rules of Court 2012 on the basis that as the plaintiff had been wound up in 2009, it had no capacity to act on its own unless a sanction had been obtained from the Insolvency Department or from the court. On account of that, the defendant had contended that the plaintiff's suit that was pending in the court an abuse of the process of court and therefore deserved to be struck out.

**[5]** The application in encl 62 was allowed by the learned judicial commissioner ('the JC') with cost of RM2,000 on 2 April 2013. Thus, this appeal by the aggrieved plaintiff. For convenience, both parties will be referred to in their respective capacity in the court below.

THE APPEAL BEFORE US

**[6]** Before us, the following issues were raised and argued by learned counsel for both parties.

**[7]** For the avoidance of doubt, it is beyond dispute that the plaintiff, having been wound up, had not obtained any sanction from the official receiver from the Insolvency Department.

**[8]** As a statement of general principle that pertains to a situation involving a wound up company, it is trite that its subsequent affairs would be in the hands of its liquidator. In matters pertaining to its legal affairs, such as a civil litigation, either as a plaintiff in pursuing a legal right or as a defendant in opposing a liability suit, it must first obtain a prior sanction from the liquidator or from the court. This must necessarily include it maintaining a suit that is pending in the court, namely a suit that was filed in the court before the winding up order was issued against it but which suit had not been finally disposed of. The legal position thus appears to be rather mundane and straight-forward. In fact, the Federal Court case of *Zaitun Marketing Sdn Bhd v Boustead Aldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 learned Justice Gopal Sri Ram FCJ had succinctly described the position of a company that has been wound up as follows:

> Once a company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings.

**[9]** In short, a prior consent is needed even to continue the prosecution of a legal proceeding, such as what obtained in the case before us.

**[10]** Coming back to this appeal before us, the plaintiff, being the wound up company, had argued that in the circumstances of this case, the application by the defendant in encl 62 before the High Court for striking out of its suit premised on the issue of locus standi ought to be dismissed on account of the application of res judicata principle. Learned counsel for the plaintiff had argued before us that in the previous interlocutory applications made by the defendants, the issue of locus standi had been raised and had been decided against the defendant. This argument was also raised before the court below and the learned JC had ruled against the plaintiff on that issue. This is how the learned JC had ruled in his grounds of decision:

> Permohonan-permohonan terdahulu yang difailkan adalah permohonan untuk menggantung prosiding dan untuk meminda Pembelaan, bukannya untuk membatalkan tuntutan seperti yang difailkan di sini. Oleh itu, konsep *res judicata* tidak terpakai.

**[11]** With respect, we agreed with the learned JC. As was further articulated by learned counsel for the defendant before us, those interlocutory applications were not concerned with the issue of sanction to continue proceeding which was the live issue before the learned JC in encl 62.

**[12]** On this issue on res judicata, we also agreed with learned counsel for the defendant in that in deciding whether a matter is caught by res judicata, the earlier judgment must with precision, determine the point in issue. Support for this proposition can be found in the decision of the Court of Appeal in the case of *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors And Other Appeals* [2003] 4 MLJ 654; [2003] 4 CLJ 505 where it was held as follows:

> When the plea of res judicata is raised, it is necessary to identify with precision the issue that was decided in the earlier proceeding. In other words, the earlier judgment must, necessarily and with precision, determine the point in issue.

**[13]** In that judgment, learned Justice Mohd Noor Ahmad JCA speaking for the bench in that *Farlim*'s case went on to explain the application of the res judicata in the context of that case as follows:

> For the purposes of the instant appeals, it was clear from the judgment of the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 4 CLJ 393 that the Federal Court did not consider and determine the validity of the agreements for the

sale of the defendants' land to the plaintiff ('the 1992 agreements'). The Federal Court had merely held that as the administration of the deceased's estate was still incomplete at that particular point in time, the defendants, as beneficiaries, had no title to pass to the plaintiff. In any case, the defendants were not even a party to the said proceedings before the Federal Court. Furthermore, the decision of the Court of Appeal in *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd & Satu Rayuan Lain* [1999] 3 CLJ 507 concerned an interlocutory order relating to injunctions. The proceedings before the Court of Appeal did not result in a final judgment or decree adjudging the ultimate rights of the parties. Consequently, the plea of res judicata (*estoppel per rem judicatum*) was inapplicable, and the learned judge was wrong in relying upon it to strike out the said action.

**[14]** Applying the principle as enunciated above, we were with learned counsel for the defendant that the issue of sanction was not caught by the res judicata principle. As such, we were not able to accede to the contention advanced before us by learned counsel for the plaintiff that this appeal be allowed on account of the application of res judicata to the facts obtaining in this case. In our considered view, the principle of res judicata did not apply here.

**[15]** Learned counsel for the plaintiff had also contended that even if the issue of locus standi was not caught, as it were, by the principle of res judicata, encl 62 ought to have been dismissed by operation of the stay orders that were granted to the plaintiff. In that regard, it was submitted before us that such a stay order had the retrospective effect of wiping off the winding up order made against the plaintiff. Because of this, we were told that the plaintiff had become competent once again to manage its own legal affairs, in particular as regards the prosecution of its litigation cases, without the need for any prior sanction. A few cases were cited to us in support. The letter dated 30 November 2013 from the Insolvency Department appearing at p 35 in the record of appeal was referred to us. It would appear at first blush that the said letter seemed to have signified that the plaintiff could operate and act on its own as was usual.

**[16]** However, learned counsel for the defendant had argued that the stay orders referred to in the said letter at p 35 did not have any retrospective effect. It was an undisputed fact that the said stay orders, being the *Perintah Penggantungan Sementara* and the *Perintah Penggantungan Sama Sekali* (stay altogether order) were obtained on the 22 April 2010 and on 16 August 2010 respectively. To recap, the plaintiff was wound up on 6 July 2009. He had referred us to the decision of the Court of Appeal in the case of *American International Assurance Bhd v Coordinated Services L Design Sdn Bhd* [2012] 1 MLJ 369. In that case, learned Justice Ramly Ali JCA (as he then was) had this to say:

There are strings of authorities to show that a stay order takes effect from the date of pronouncement of the order and not backdated to the date of the winding up order.

A

> A stay order does not wipe the winding up order out of existence but would only be operative from the date of the grating of the stay order.

**[17]** With respect, we agreed with Justice Ramly Ali on the legal proposition on the operative effect of a stay order in relation to a winding up order issued against a company, and we had nothing useful to add to the discourse.

B

FINDING OF THIS COURT

C

**[18]** So, having had the benefit of hearing able submissions by both learned counsel before us, in the light of the materials placed in therecord of appeal, we were of the considered view that there were no merits in the contentions advanced by learned counsel for the plaintiff in this appeal. As there was no prior sanction obtained by the plaintiff from the official receiver to continue or maintain its action against the defendant after it was wound up by the court, with respect, its action against the defendant, no longer had any proverbial legs to stand on. In a similar appeal in the case of *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406 based on the issue of lack of sanction, this is what the Court of Appeal had said:

D

E

> We are of the view that the action by the appellant against the respondent should be struck out on the ground of failure on the part of the appellant to obtain prior leave or sanction either from the official assignee as liquidator or the court under s 233(2) of the Companies Act 1965.

F

> This a clear case for the court to invoke its power under O 18 r 19 of the RHC 1980, to ensure that any claim brought by the appellant against the respondent has a basis on which the court may adjudicate. With respect, the present claim by the appellant against the respondent is obviously unarguable, unsustainable and an abuse of the process of the court.

G

**[19]** Therefore, the long and short of it is this. Once it is established that a company has been wound up and there is no sanction obtained subsequent to that event, it becomes incapacitated in so far as its capacity to sue or to defend a legal suit is concerned. This extends to its capacity to properly maintain or continue a pending suit in court. In our view, no stay order can have a retrospective effect, in the sense that it is incapable of wiping out a winding up order out of existence. As the plaintiff in this appeal had not applied for a sanction upon it being wound up on 6 July 2009 its action against the defendant cannot in law be sustained and had become an abuse of court process. The JC was therefore right in allowing the encl 62 and for having struck out the plaintiff's action against the defendant.

H

I

CONCLUSION

**[20]** In the upshot, we therefore had unanimously dismissed this appeal with costs of RM5,000 to the defendant. The order of High Court dated 2 April 2013 was affirmed. Deposit to be paid to the defendant as part of costs. We had so ordered.

*Appeal dismissed and decision of the High Court affirmed with costs of RM5,000.*

Reported by Ashok Kumar